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No. 93-752

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CARLOTTA MITCHELL,
Petitioner,

v.

ALBUQUERQUE BOARD OF EDUCATION,
d/b/a ALBUQUERQUE PUBLIC SCHOOLS,
LILLIAN BARNA, JOE GROOM and JOHN MONDRAGON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT CAN ADOPT PETITIONER'S RULE THAT *KREMER* DOES NOT APPLY TO STATE COURT REVIEW OF NONSECTON 706 AGENCY DETERMINATIONS WHERE STATE PRECLUSION LAW GOVERNS THIS ISSUE

II. WHETHER THE FINDING THAT PETITIONER WAS PROPERLY TERMINATED COLLATERALLY ESTOPPED HER CLAIMS OF RACE DISCRIMINATION, WHERE THE LAWFULNESS OF THE ORDER PETITIONER DISOBEYED WAS A NECESSARY FINDING IN THE STATE PROCEEDINGS AND THUS DISPOSITIVE OF HER FEDERAL DISCRIMINATION ACTION.

III. WHETHER THE PRINCIPLE OF *STARE DECISIS* AND THE POLICIES OF FEDERALISM, COMITY AND FINALITY DICTATE THAT *KREMER* NOT BE OVERRULED.

IV. WHETHER THE DECISION BELOW SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT *RES JUDICATA* BARS PETITIONER'S CLAIMS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
ADDITIONAL RULES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
I. PETITIONER'S PROPOSAL TO NARROW THE *KREMER* HOLDING CONTRAVENES ESTABLISHED FULL FAITH AND CREDIT LAW AND SHOULD BE REJECTED	6
A. *Kremer's* Applicability to Non-Section 706 Proceedings Is a Matter of State Preclusion Law, Not Federal Law	7
B. There Is No Conflict Among the Circuits with Respect to Whether *Kremer* Applies to Non-Section 706 Agency Determinations	9
C. Analysis Under *Kremer* Necessarily Entails a Case-By-Case Examination of the State Proceedings and Federal Claims	11
II. THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE AFFIRMANCE OF PETITIONER'S TERMINATION NECESSARILY REJECTED HER CLAIMS OF UNLAWFUL DISCRIMINATION	13
A. The Decision Below Does Not Conflict with *McDonald v. Santa Fe Trail Transportation Company*	13
B. Whether a Finding of Just Cause Necessarily Determines That There Was No Unlawful Discrimination Depends on the Facts of Each Case	14

TABLE OF CONTENTS—Continued

Page

III. THE PRINCIPLE OF *STARE DECISIS* AND THE POLICIES OF FEDERALISM, COMITY AND FINALITY DICTATE ADHERENCE TO *KREMER* 16

IV. THE DECISION BELOW SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUNDS OF *RES JUDICATA* 19

CONCLUSION 23

APPENDIX A:

Answer to Complaint, U.S. District Court for the District of New Mexico, No. CIV 86-1184 M (Nov. 5, 1986) 1a

APPENDIX B:

Excerpts from Brief in Support of Defendants' Motion for Summary Judgment, U.S. District Court for the District of New Mexico, No. CIV 88-0615 M (Dec. 16, 1988) 5a

APPENDIX C:

Excerpts from Response to Defendants' Motion for Summary Judgment, U.S. District Court for the District of New Mexico, Nos. CIV-86-1184 JB and CIV-88-0615 M (Consolidated) (Sept. 15, 1989) 9a

TABLE OF AUTHORITIES

FEDERAL CASES:	Page
Allen v. McCurry, 449 U.S. 90 (1980)	16
Arizona v. Rumsey, 467 U.S. 203 (1984)	18
Astoria Federal Savings and Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991)	16
Bryan v. Chemical Bank, 655 F. Supp. 322 (S.D. N.Y. 1987)	15
Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984)	8, 10
Butler v. City of North Little Rock, Arkansas, 980 F.2d 501 (8th Cir. 1992)	15
Carlisle v. Phenix City Bd. of Ed., 849 F.2d 1376 (11th Cir. 1988)	9, 11, 12, 15
Cooper v. Oak Park School District, 624 F. Supp. 515 (E.D. Mich. 1986)	15
Hill v. Coca Cola Bottling Co. of N.Y., 786 F.2d 550 (2nd Cir. 1986)	9, 11, 15
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	19
Jarrett v. Gramling, 841 F.2d 354 (10th Cir. 1988)	21, 23
Kelley v. TYK Refractories Co., 860 F.2d 1188 (3rd Cir. 1988)	9, 15
Kent v. New York City Dep't of Sanitation, 549 F. Supp. 750 (S.D.N.Y. 1982)	10
Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982)	*passim*
Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)	7
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)	13, 14
Migra v. Warren City School District Bd. of Education, 465 U.S. 75 (1984)	7, 16
Parson's Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986)	17
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	18, 19
Payne v. Tennessee, 111 S. Ct. 2597 (1991)	19
Pirela v. Village of North Aurora, 935 F.2d 909 (7th Cir. 1991)	22, 23

TABLE OF AUTHORITIES—Continued

	Page
Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)	18, 19
Spinola v. Coles, 697 F. Supp. 895 (W.D. Pa. 1988)	10
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986)	19
Stitzer v. University of Puerto Rico, 617 F. Supp. 1246 (D. P.R. 1985)	10
United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966)	16
University of Tennessee v. Elliott, 478 U.S. 788 (1986)	7
Vasquez v. Hillery, 474 U.S. 254 (1976)	19
Welch v. Johnson, 907 F.2d 714 (7th Cir. 1990)	22, 23
STATE CASES:	
DiMatteo v. County of Doña Ana, 785 P.2d 285 (N.M. App. 1989)	21
Silva v. State of New Mexico, 745 P.2d 380 (N.M. 1987)	20, 21
Three Rivers Land Co. v. Maddoux, 652 P.2d 240 (N.M. 1982)	20, 21
STATUTES:	
28 U.S.C. § 1738	*passim*
42 U.S.C. § 1983	5
42 U.S.C. § 1985	5
42 U.S.C. § 2000(e) (Title VII)	*passim*
Section 22-10-19 NMSA 1978 (Repl. 1984)	4, 12
Section 22-10-20 NMSA 1978 (Repl. 1984)	5
MISCELLANEOUS:	
RESTATEMENT (SECOND) OF JUDGMENTS, § 24 (1982)	20
RESTATEMENT (SECOND) OF JUDGMENTS, § 25 (1982)	20
Local Rule 9(j)(2) of the U.S. District Court for the District of New Mexico	1, 4
State Board of Education Regulation 77-1	2, 14

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RESPONDENT'S BRIEF IN OPPOSITION

ADDITIONAL RULES AND REGULATIONS INVOLVED

Local Rule 9(j)(2) of the
United States District Court
for the District of New Mexico

j. *Summary Judgment.*

* * * *

(2) *Statement of Material Facts.* The moving party shall file with the motion a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon. A

party opposing the motion shall, within 10 days after service of the motion, file a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. The moving party may, within ten days after the service of such memorandum, file a written reply memorandum.

The memorandum in support of the motion shall set out as its opening a concise statement of all of the material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

The material required by this subsection shall be in addition to any material required by these Rules and the Federal Rules of Civil Procedure.

State Board of Education
Regulation 77-1

INSUBORDINATION AND UNSATISFACTORY WORK PERFORMANCE OF CERTIFIED SCHOOL PERSONNEL

* * * *

III. DEFINITIONS. As used in this regulation the following words, terms and phrases shall have the meaning set forth in this paragraph.

* * * *

C. "Insubordination" means actual or implied willful refusal to follow written policies, rules or procedures established by the State Board of Education, the local school board, or administrative authorities, or the lawful written or oral orders, requests or instructions of administrative authorities, including, but not limited to, those procedures established for the administration or infliction of corporal punishment.

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains primarily conclusory, self-serving statements that were not established as facts of record at the summary judgment stage. Petitioner Carlotta Mitchell ("Mitchell") extracts much of the argumentative portion of her Statement of the Case from her Complaint. Because Respondents denied almost all of these allegations in their Answer, *see* Appendix A, Respondents submit that such contentions are not properly before this Court. Accordingly, Respondents dispute each of the contentions contained in the second paragraph of Petitioner's Statement of the Case and also dispute the claim that "there had been no other Black person employed [at Bandelier] in 'recent memory.'" Petitioner also attempts to mislead the Court with the assertion that she "began teaching fifth grade at Bandelier School . . . for the 1985-86 school year." In fact, Petitioner began teaching at Bandelier School in 1982. She was assigned to fifth grade her final year at Bandelier.

Respondents' Statement of the Case below, in contrast, presents the uncontested and admitted facts actually before the District Court and the Tenth Circuit Court of Appeals in this case. Unless specified, each of the facts discussed below is taken from the Statement of Material Facts contained in Respondent's Summary Judgment Brief filed with the district court. *See* Appendix B. In responding to this Motion, Mitchell either conceded or

failed properly to challenge [1] such facts. *See* Appendix C.

Petitioner was terminated from her teaching position by Respondent the Board of Education of the City of Albuquerque for insubordination after she refused to prepare a written improvement plan as requested by her principal, Mr. Joe Groom. An improvement plan is a supervisory technique frequently used in education.

Mr. Groom had directed Petitioner to develop a written improvement plan addressing her repeated instances of hostile and abusive conduct towards children and parents and her ongoing resistance to the school district's policy of "mainstreaming," which calls for integrating special education students into regular classrooms. Petitioner refused for over six months to develop a plan for her own improvement, and ultimately submitted a plan for Mr. Groom's improvement, at which point she was suspended for insubordination.

Following her suspension, Petitioner had a full adversarial hearing before the Albuquerque Public Schools Board of Education (the "local board") pursuant to the then-applicable statute, Section 22-10-19 N.M.S.A. 1978 (1984 Repl.). That statute provides that all parties may appear and present testimony "on *all pertinent issues,*" that the party who has been discharged may be represented by counsel. and that "the contentions or the defenses of each party to the hearing shall be amply and fairly presented without substantial prejudice." (Emphasis added.)

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[1] *See* Local Rule 9(j)(2) of the United States District Court for the District of New Mexico, *supra* at 1-2 (requiring party opposing Motion for Summary Judgment to "refer with particularity to the portions of the record upon which [that] party relies" in disputing material facts and stating that "[a]ll material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted").

Petitioners' hearing before the local board lasted eight sessions totalling in excess of forty hours, and involved the testimony of twenty-four witnesses and the submission of over sixty exhibits. Petitioner, who was represented by counsel, contended in the course of the hearing that the stated reason for her discharge (insubordination) was pretextual and that instead she was really terminated because of racial bias against her. In support of this contention she maintained that the parents and students were lying about her conduct toward them, and that she was treated differently from other teachers who allegedly also screamed at children and opposed the mainstreaming program.

The local board upheld her termination, and Petitioner appealed this decision to the New Mexico State Board of Education ("state board"), pursuant to Section 22-10-20 N.M.S.A. 1978 (1984 Repl.), which provides for representation by counsel, discovery, briefs, subpoena power and a full *de novo* hearing. Ultimately, the state board issued a decision upholding Petitioner's termination.

Next, Petitioner appealed the decision of the state board to the New Mexico Court of Appeals pursuant to Section 22-10-20(J), N.M.S.A. 1978 (1984 Repl.). Before the state appeals court she renewed her argument that the decision to terminate her was not for good and just cause and not in accordance with law. The court reviewed the record, considered briefs, and rejected Petitioner's argument, upholding the decisions of the local board and the state board. The Court of Appeals held specifically that Petitioner had failed to show "that the State Board's decision was not in accordance with law." *See* Appendix C to Petition for Writ of Certiorari ("Petition").

Prior to the New Mexico Court of Appeals' consideration of her appeal, Petitioner filed suit in state court charging that her termination was in violation of 42 U.S.C. §§ 1983, and 1985. She also filed suit in United

States District Court, alleging violations of 42 U.S.C. § 2000(e), *et seq.* ("Title VII"). Respondents removed Petitioner's state court suit to the United States Court for the District of New Mexico and consolidated it with her federal court suit. The District Court granted Respondents' Motion for Summary Judgment, and the Tenth Circuit Court of Appeals affirmed this decision in part, reversed in part and remanded for further proceedings. *See* Appendix A to Petition.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the issues posited for review involve case-specific and fact-dependent applications of state, not federal law. Petitioner has failed to identify any split in the circuit courts of appeals over the interpretation of *Kremer v. Chemical Constr. Corp.*, 465 U.S. 461 (1982). Rather, she points only to a difference in results reached in certain cases through the application of *Kremer* to the individual facts of each case and the preclusion law of the particular state whose judgment was at issue. The Tenth Circuit Court of Appeals has not decided a question of federal law; it has taken well-settled and well-reasoned precedent and applied it to reach a result with which Petitioner disagrees. Finally, the Petition does not raise any of the considerations which would move this Court to take the extraordinary step of overruling *Kremer*.

I. PETITIONER'S PROPOSAL TO NARROW THE *KREMER* HOLDING CONTRAVENES ESTABLISHED FULL FAITH AND CREDIT LAW AND SHOULD BE REJECTED.

In her Petition, Mitchell urges this Court to adopt an analytically unsound reading of *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Under Petitioner's reasoning, the Court should now hold that the principles of claim and issue preclusion articulated in *Kremer* apply only where the state court judgment results from review of "Section 706" agency determinations. Other state court

judgments presumably would not be entitled to preclusive effect. There is no authority in statute or in federal common law for this proposition.

This aspect of Petitioner's argument fails because state rules of *res judicata* and collateral estoppel govern the preclusive effect of state court judgments in federal court (an issue that necessarily involves a case-by-case determination), and because there has been no conflict among the circuits concerning how *Kramer* should be applied. Accordingly, the Petition for Writ of Certiorari should be denied.

A. *Kremer's* Applicability to Non-Section 706 Proceedings Is a Matter of State Preclusion Law, Not Federal Law.

In *Kremer*, this Court determined that Title VII, 42 U.S.C. § 2000e (1981), *et seq.*, neither expressly nor impliedly repealed the Full Faith and Credit statute. The Court premised its holding on a thorough analysis of both the legislative history and the policies underlying Title VII. *See Kremer*, 456 U.S. at 468-77. Unless the Court abandons this holding, the Full Faith and Credit statute applies to Title VII cases brought in federal court. Therefore, federal courts must accord to state court judgments the same preclusive effect to which they would be entitled in the state where such judgments were rendered. *See Kremer*, 456 U.S. at 466; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Migra v. Warren City School District Bd. of Education*, 465 U.S. 75, 81 (1984).

Petitioner's argument that a state court judgment should not be entitled to preclusive effect unless it stems from review of a section 706 agency determination violates this fundamental principle of Full Faith and Credit law, as well as the policy of federalism.[2] Petitioner's failure to

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[2] *See University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986) ("[h]aving federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism").

acknowledge that state law of *res judicata* and collateral estoppel govern the preclusive effect of a state court judgment leads her erroneously to characterize the issue as one of federal law. In short, this Court cannot create a blanket rule of the type Petitioner proposes because to do so would require the Court to engraft such a rule into the preclusion law of every state and to rewrite the Full Faith and Credit statute.

In this case, Mitchell appealed the local board's ruling concerning her termination to the state board and subsequently to the New Mexico Court of Appeals. At each of these levels, her termination was upheld. The New Mexico Court of Appeals' consideration and rejection of Mitchell's claims triggered 28 U.S.C. § 1738 for purposes of re-evaluating her Title VII claims in federal court. Both the district court and the Tenth Circuit Court of Appeals recognized Section 1738's applicability and correctly determined that Mitchell's Title VII claim was barred under New Mexico collateral estoppel principles.

Petitioner's failure to refer to any language in Title VII that indicates an intention to repeal the Full Faith and Credit clause in the manner she proposes reflects an inability to do so. Moreover, nothing in *Kremer* indicates that this Court intended to limit its holding to cases arising in the context of Section 706 agency determinations. Rather, *Kremer* established that 28 U.S.C. § 1738 applies in Title VII cases. Because it is a state court judgment that must be given effect in a subsequent federal action, the identity of the agency whose ruling was reviewed in the state court is immaterial to *Kremer's* full faith and credit analysis. *See Burney v. Polk Community College*, 728 F.2d 1374, 1379 (11th Cir. 1984) ("it is the state court judgment, and not the agency affirmed, that is determinative of a federal court's full faith and credit obligation").

Short of a complete revamping of both the federal full faith and credit law and each state's preclusion doc-

trines, therefore, this Court cannot accept Petitioner's reasoning. Certiorari should be denied for the additional reason that the issue framed by Petitioner does not involve an important question of federal law, but rather implicates questions of state preclusion law.

B. There Is No Conflict Among the Circuits with Respect to Whether *Kremer* Applies to Non-Section 706 Agency Determinations.

The cases Petitioner cites for her contention that three of the federal circuit courts of appeal do not apply *Kremer* to state court affirmance of non-Section 706 agency determinations do not stand for such a proposition. *Carlisle v. Phenix City Bd. of Ed.*, 849 F.2d 1376 (11th Cir. 1988), and *Hill v. Coca Cola Bottling Co. of N.Y.*, 786 F.2d 550 (2nd Cir. 1986), both acknowledged *Kremer's* applicability. Neither court departed from the tenet that state preclusion law controls the effect of a state court judgment in federal court. *See Carlisle*, 849 F.2d at 1380 (consulting Alabama *res judicata* law to determine whether causes of action were identical); *Hill*, 786 F.2d at 552 ("[s]ince Hill's administrative proceeding before the state labor department was judicially confirmed in the Article 78 proceeding, we are required by *Kremer* to apply New York's law on collateral estoppel"). Further, *Kelley v. TYK Refractories Co.*, 860 F.2d 1188 (3rd Cir. 1988), did not even involve a Title VII claim. Nonetheless, that court recognized that it was "required to give the Unemployment Compensation Review Board's factfinding the same preclusive effect to which it would be entitled in the Pennsylvania courts." *Kelley*, 860 F.2d at 1193. These courts' refusal to bar discrimination claims following certain state proceedings only reflects the fact that the applicability of *Kremer* necessarily involves a case-by-case determination.

Moreover, though Petitioner maintains that the Court of Appeals for the Eleventh Circuit is one of three circuits that apply her narrow and ill-conceived construction

of *Kremer*, to the contrary, that court has confronted directly the identical issue Petitioner raises and squarely rejected it. *Burney v. Polk Community College*, 728 F.2d 1374 (11th Cir. 1984), involved a plaintiff's appeal from the entry of summary judgment that, *inter alia*, dismissed his Title VII claim on collateral estoppel grounds. Considering the dismissal of the Title VII claim, the court stated:

> Plaintiff claims that the scope of the *Kremer* holding is limited to state court judgments affirming a state equal employment agency's orders. In support of this claim, plaintiff notes that the precise factual context of *Kremer* was a state court's affirmance of a state equal employment agency's order. We hold, however, that the *Kremer* analysis extends to the present state court judgment affirming the [Polk Community College] Board's order, and that in this case it is the state court judgment, and not the agency affirmed, that is determinative of a federal court's full faith and credit obligation.

Burney, 728 F.2d at 1379.

Likewise, district courts within the Second and Third Circuits have not discerned a rule of the type Petitioner proposes and have not hestitated to apply the preclusion principles embodied in *Kremer* to state court affirmances of non-Section 706 agencies where the circumstances of the particular case so warranted. *See, e.g., Kent v. New York City Dep't of Sanitation*, 549 F. Supp. 570, 573 (S.D.N.Y. 1982) (precluding Title VII action based on state court review of sanitation department proceedings), *aff'd*, 722 F.2d 728 (2nd Cir.), *cert. denied*, 446 U.S. 941 (1983); *Spinola v. Coles*, 697 F. Supp. 895, 896 (W.D. Pa. 1988) (state court review of Pennsylvania Civil Service Commission finding of "just cause for dismissal" barred subsequent Title VII action); *Stitzer v. University of Puerto Rico*, 617 F. Supp. 1246, 1251, 1260 (D. P.R. 1985) ("[p]rinciples of *res judicata*,

collateral estoppel and comity" barred Title VII claim where Superior Court of Puerto Rico denied application for review of decision by Higher Education Council). These cases reflect the only analytically defensible interpretation of the *Kremer* holding: state rules of *res judicata* and collateral estoppel apply to state court judgments in subsequent Title VII actions regardless of the administrative agency that initially considered such claims. The absence of any split of authority among the circuits with respect to this quesion is a further, compelling reason to deny certiorari in this case.

C. Analysis Under *Kremer* Necessarily Entails a Case-By-Case Examination of the State Proceedings and Federal Claims.

The *Hill* and *Carlisle* decisions, upon which Petitioner relies, highlight the fact-specific nature of this issue. They demonstrate that, in ascertaining the preclusive effect of a state court judgment, a federal court considering a preclusion claim must analyze the specific claims adjudicated in the state proceedings and the procedural context within which they were decided. In *Hill*, the Second Circuit Court of Appeals considered whether New York law of collateral estoppel barred a Title VII suit in federal court where the Title VII plaintiff had received judicial review of his claim for unemployment benefits. *Hill*, 786 F.2d at 551-52. The court observed that in the hearing before the unemployment insurance appeal board the plaintiff's "claim of race discrimination was barely mentioned." *Id.* at 553.[3] The court concluded that plaintiff was not collaterally estopped because he did not have a full and fair opportunity to litigate his discrimination claim in the unemployment compensation proceedings.

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[3] Petitioner re-argues in her Petition that there are only a few references to race in her hearings before the local board, but fails to inform the Court that in her response to APS's summary judgment motion she conceded actual litigation of her pretext claim in that forum, a point that the court of appeals discussed in detail. *See* Appendix A to Petition at A8-A9.

Id. at 553-54. It was the substance of the administrative proceedings, not the type of administrative forum in which they took place, that controlled the result in *Hill*. The same is true in this case, although the result differed, because, as the court of appeals below correctly held, Mitchell failed at the summary judgment stage to raise a genuine issue of material fact concerning whether she had a full and fair opportunity to litigate her race discrimination claim in the state proceedings. *See* Appendix A to Petition at A12.

Carlisle likewise differs from the present case. There, the Plaintiff was not estopped from proceeding in federal court because the administrative hearings before a school board and tenure commission did not consider the plaintiff's discrimination claims due to both the limited scope of the inquiry available in those proceedings and the additional fact that plaintiff's discrimination claims rested on facts of which he was not even aware until after the tenure commission proceedings had concluded. *Carlisle*, 849 F.2d at 1379-80, 1382.

In this case, the Tenth Circuit Court of Appeals thoroughly analyzed Mitchell's federal claims against the background of her state proceedings and the scope of the issues properly and necessarily determined at the state level. *See* Appendix A to Petition at A2-A3; A7-A12 (discussing the extent of Mitchell's hearing before the local board, the state regulations applicable thereto and the summary judgment context within which district court determined that collateral estoppel barred Mitchell's Title VII claim). Unlike the Alabama tenure commission in *Carlisle*, the local board here is statutorily authorized to admit testimony and evidence "on all pertinent issues." *Id.* at A10 (quoting § 22-10-19(A) N.M.S.A. 1978 (Repl. 1984)). The court of appeals below concluded that Mitchell actually litigated her claims of race discrimination in the state proceedings and that affirmance of the decision to terminate her necessarily rejected her contention that she was treated discriminatorily.

This Court should not revisit such issues. Petitioner's contention that the courts below should not have applied *Kremer* in the absence of a § 706 agency determination is analytically deficient. Short of overruling *Kremer* (*see infra* Point III), therefore, this Court's review of the Tenth Circuit Court of Appeals' opinion would necessarily be limited to whether its application of New Mexico preclusion law was proper *under the circumstances of this case*. Such a ruling would not have broad implications for lower courts in confronting the *Kremer* holding; rather, it would affect only certain cases in New Mexico and in states with identical preclusion law where the same factual and procedural circumstances are present. The narrow effect of this Court's review of the decision below constitutes an additional reason justifying the denial of certiorari in this case.

II. THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE AFFIRMANCE OF PETITIONER'S TERMINATION NECESSARILY REJECTED HER CLAIMS OF UNLAWFUL DISCRIMINATION.

A. The Decision Below Does Not Conflict with *McDonald v. Santa Fe Trail Transportation Company.*

Mitchell's contention that the court of appeals' decision conflicts with *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), is plainly without merit. *McDonald* did not involve the application of state preclusion law to a Title VII claim. Rather, the Court in *McDonald* considered whether the Title VII plaintiffs' admission in their complaint that their discharge was based "on participation in serious misconduct or crime" justified dismissal of their Title VII complaint. *McDonald*, 427 U.S. at 276, 283. Observing that the complaint, in essence, charged that plaintiffs were treated differently from fellow employees who participated in the same misconduct, this Court concluded that plaintiffs could have established a Title VII claim if race discrimination played a role in their discharge. *Id.* at 282-284.

In the present case, the local board determined more than that there was a non-discriminatory reason for Mitchell's termination. Necessary to the board's determination that Mitchell was insubordinate was a finding that the order she disobeyed was "lawful". *See* Appendix A to Petition at A7-A8 (citing State Board of Education Regulation 77-1). The New Mexico Court of Appeals likewise concluded that the lawfulness of Mr. Groom's order was a central issue in the state proceedings:

> Thus, we understand the [hearing officer's] finding and the conclusion as a rejection of Mitchell's claim that the order was unlawful. For this reason we are not persuaded that the hearing officer failed to consider Mitchell's contention on its merits.
>
> * * *
>
> . . . [Mitchell] has not demonstrated that the State Board's decision was not in accordance with law and has not established other reversible error.

Unpublished decision of the New Mexico Court of Appeals, quoted in Appendix A to Petition at A11-A12. Based on these particular circumstances, the Court of Appeals for the Tenth Circuit properly determined that the New Mexico Court of Appeals' affirmance of Mitchell's termination necessarily entailed a finding that there was no unlawful discrimination. Mitchell's argument that this conclusion conflicts with *McDonald* is unfounded and fails to account for the manifest distinctions between the factual and legal contexts within which this case and *McDonald* were decided.

B. Whether a Finding of Just Cause Necessarily Determines That There Was No Unlawful Discrimination Depends on the Facts of Each Case.

The circuit courts of appeal are not divided over the question whether a finding of cause for termination inferentially negates a race discrimination claim. Each of the cases upon which Petitioner relies for this proposition

turned on the facts of the specific case. *See Kelley*, 860 F.2d at 1195 ("the lack of identity of issues is manifest in the absence in the first adjudication . . . of any reference to facts relating to the central concern of the second action"); *Carlisle*, 849 F.2d at 1382 ("[g]iven the specific nature of Carlisle's federal claims and the specific evidence supporting those claims, we are constrained from concluding that Carlisle could have raised his racial bias claim before the tenure commission"); *Hill*, 786 F.2d at 553 (concluding that Title VII plaintiffs did not "receive before the unemployment insurance board a full and fair opportunity to litigate the racial discrimination issue, as that concept is viewed in New York").

Petitioner ignores numerous cases in which the courts determined that a finding of just cause for termination negated a subsequent Title VII claim. *See, e.g., Butler v. City of North Little Rock, Arkansas*, 980 F.2d 501, 504, n.2 (8th Cir. 1982) (holding that discrimination claims were alternatively barred by collateral estoppel where they "were directly and necessarily litigated in the state court"); *Cooper v. Oak Park School District*, 624 F. Supp. 515, 519 (E.D. Mich. 1986) ("[u]nder collateral estoppel, the Commission's determination of plaintiff's discrimination defense was necessary to its judgment of just discharge"); *Bryan v. Chemical Bank*, 655 F. Supp. 322, 325 (S.D.N.Y. 1987) ("[n]ecessary to Judge Conner's holding that plaintiff was terminated for good cause were the factual findings that no discrimination was involved, and that the reason for plaintiff's discharge was his negligent conduct which cast the defendant in substantial liability"). In short, Mitchell's suggestion that state "just cause" proceedings will never necessarily equate with an adverse determination of a race discrimination claim ignores the fact-dependent nature of this question. In many cases, such as this one, it does. Petitioner cannot, under the guise of citation to federal cases, convert this issue into a federal question that is allegedly dividing the circuit courts of appeal. In fact, this issue involves merely

the application of state preclusion law on a case-by-case basis.

III. THE PRINCIPLE OF *STARE DECISIS* AND THE POLICIES OF FEDERALISM, COMITY AND FINALITY DICTATE ADHERENCE TO *KREMER*.

In asking this Court to take the extraordinary action of overruling *Kremer*, Petitioner ignores the line of cases decided by this Court applying Section 1738 and neglects to consider the impact of the action she advocates on such precedents. Section 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for state and federal claims." *Migra v. Warren City School District Board of Education, et al.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 103 (1980) (finding no authority for the proposition that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court); *see also United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 420 (1966) (explaining that the application of preclusion doctrines "avoids needless duplication of evidentiary hearings and an additional heavy burden on time and expense necessary to bring litigation to an end" and "encourages parties to make complete disclosure at the administrative level rather than holding evidence back for subsequent litigation"); *Astoria Federal Savings and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991) (addressing preclusive effect of unreviewed administrative finding on subsequent claim under Age Discrimination in Employment Act, and acknowledging that 28 U.S.C. § 1738 has applied to "state court judgments in the closely parallel context of Title VII").

The policy considerations advanced by Petitioner in support of reversal, taken exclusively from the dissent in *Kremer*, reiterate contentions which have been considered and rejected by a majority of this Court. Petitioner's

asesrtion that reversal of *Kremer* would increase the number of cases brought to resolution at the state level is illogical. Such reversal could only have the effect of eliminating parties' incentive to participate in good faith, or at all, in administrative or state court proceedings. Whether, as Petitioner argues, *Kremer* encourages plaintiffs to "hide the ball" in state proceedings depends on the preclusion doctrines of the forum state. Moreover, *Kremer* certainly did not compel Petitioner to conceal her claims or avoid exhaustion of every available avenue of appeal.

Petitioner's proposal is that litigants be afforded the full panoply of state proceedings *and* full federal proceedings in the same case. The state proceedings, under Petitioner's argument, resolve nothing, and become no more than a risk-free dress rehearsal for parties who have a guaranteed second chance in federal court. *Kremer* places the same limitation on all parties to a discrimination action: both sides are precluded from trying a case over and over until they win it.

Petitioner's fairness argument is equally unsound. She was represented by counsel at every level and chose to pursue her claim through the state court level, presumably with full knowledge of the rule articulated in *Kremer*. Her disappointment with the results is not justification for overturning the Tenth Circuit's application of well-settled law to her case or for overruling *Kremer*. Applying state preclusion doctrines, as required by *Kremer*, to Title VII cases is no less fair than applying the same principles to any other case adjudicated by a state court. In sum, Petitioner's policy arguments are unmeritorious and cannot serve as a substitute for the high degree of proof necessary to establish an implied repeal of 28 U.S.C. § 1738. *See Parson's Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523-24 (1986) ("[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored").

This Court's thorough discussion of *stare decisis* in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-2816 (1992) disposes of Petitioner's argument that *Kremer* should be overruled. "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete". *Planned Parenthood*, 112 S. Ct. at 2815.

Petitioner's case does not meet even one of the criteria for reversal discussed in *Planned Parenthood*. First, the rule articulated in *Kremer* has not been found unworkable; to the contrary it has been applied so as to effectuate 28 U.S.C. § 1738 and to prevent the scarce resources of the federal courts from becoming the forum of first resort for discrimination claims. In this respect, *Kremer*, also has served to further the purposes of Title VII, which favors early non-judicial resolution of discrimination complaints. Second, *Kremer's* overruling would do great violence to the Full Faith and Credit statute and its concomitant policies of federalism and comity. *Kremer* has remained vital and viable during the years since its decision; indeed, it has been relied on in countless cases at the trial court level and in numerous reported cases at the appellate level. Finally, *Kremer*'s premises of fact have remained unaltered; that is, the language and legislative history of Title VII have not changed such that an implied repeal of 28 U.S.C. § 1738 is more apparent now than it was when *Kremer* was decided. There has been no "evolution of principle" leaving *Kremer*'s "doctrinal footings weaker than they were" in 1982. *Planned Parenthood*, 112 S. Ct. at 2810.

This Court has said repeatedly and with emphasis that "the doctrine of *stare decisis* is of fundamental importance to the rule of law". *Patterson v. McLean Union*, 491 U.S. 164, 172 (1989); *see also Arizona v. Rumsey*, 467 U.S. 203 (1984). This Court also has

stressed that the burden borne by the party advocating the abandonment of an established precedent is even greater when the decision sought to be reversed is founded in statutory, rather than constitutional, language. "Consideration of *stare decisis* has special force in the area of statutory interpretation, for here, unlike any context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at 172-72, *citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *see also Vasquez v. Hillery*, 474 U.S. 254, 256-66 (1976); *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991). Petitioner has not argued that "changes in society or in the law dictate that the value served by *stare decisis* should yield in favor of a greater objective"; rather, Petitioner is complaining only that the views of the minority in *Kremer* did not prevail. *Vasquez*, 474 U.S. at 266. This Court requires a higher justification. "[T]o overrule should rest on some special reason over and above the belief that a case was wrongly decided." *Planned Parenthood*, 112 S. Ct. at 2814.

IV. THE DECISION BELOW SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUNDS OF *RES JUDICATA*.

Although the Tenth Circuit Court of Appeals in this case declined to apply *res judicata* as a bar to Mitchell's claims, should this Court grant certiorari, it should undertake an independent analysis of whether the court of appeals' judgment may be affirmed on the alternative ground of *res judicata*.[4] The court of appeals premised its holding concerning *res judicata* on the conclusion that

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[4] Although Respondents have not cross-petitioned for review of the court of appeals' remand of Mitchell's putative First Amendment claim, a *res judicata* analysis would be equally applicable to bar this claim as well.

the causes of action were different in the state and federal proceedings. In support of this determination, the court quoted language from *Silva v. State of New Mexico*, 745 P.2d 380, 382 (N.M. 1987):

> When the duty sued upon stems from different roots in the prior and subsequent actions, even if both actions involve essentially the same course of wrongful conduct, it is indicated that the suits arise from different causes of action.

The court, however, did not analyze whether *Silva* marked a departure from New Mexico precedent that had adopted the transactional approach for identifying a cause of action from the RESTATEMENT (SECOND) OF JUDGMENTS §§ 24, 25 (1982). *See Three Rivers Land Co. v. Maddoux*, 652 P.2d 240, 245 (N.M. 1982), *overruled on other grounds, Universal Life Church v. Coxon*, 728 P.2d 467 (N.M. 1986). Under the Restatement approach, quoted in *Three Rivers*, "the claim extinguished [by a valid and final judgment] includes all rights of the plaintiff to remedies against the defendant with respect *to all or any part of the transaction, or series of connected transactions, out of which the action arose.*" RESTATEMENT (SECOND) OF JUDGMENTS, § 24(1) (emphasis added). In defining the components of a claim, the Restatement provides:

> What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related *in time, space, origin, or motivation*, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS, § 24(2) (emphasis added).

Although the *Silva* court defined a cause of action for *res judicata* purposes in somewhat different terminology,

nothing in *Silva* indicates an intention to abandon the transactional test. To the contrary, the *Silva* court cited *Three Rivers* for the elements of *res judicata*. *See Silva*, 745 P.2d at 382. Moreover, it is apparent from the factual circumstances of *Silva* that application of the transactional approach would have yielded the same finding, i.e., that the causes of action were different.[5]

Application of the still-viable transactional test to Petitioner's case compels a finding that her state and federal suits were the same cause of action for purposes of *res judicata*. Petitioner's allegedly improper discharge was the basis of the administrative hearing, the administrative appeal, the proceedings in the New Mexico Court of Appeals, and her federal court action. Further, the lawfulness of Mr. Groom's request that Mitchell prepare and submit an improvement plan lay at the heart of both her state and federal claims, as the court of appeals below recognized. *See* Appendix A to Petition at p. A7-A8. Mitchell's state and federal causes of action were identical even under *Silva*'s formulation of the rule because both suits implicated the same duty, i.e., the duty not to terminate Mitchell unlawfully. Accordingly, *res judicata* is applicable to this case because the federal and state claims arose out of the same transaction, namely the circumstances surrounding Mitchell's termination.

In a similar case, the Court of Appeals for the Tenth Circuit addresesd the dismissal of a police lieutenant's federal action claiming that his discharge violated federal and state civil rights laws. *Jarrett v. Gramling*, 841 F.2d 354 (10th Cir. 1988). The dismissal was premised on the preclusive effect of an Oklahoma state court's denial

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[5] As a further indication that the *Silva* court did not intend to overrule *Three Rivers*' adoption of the transactional approach, the New Mexico Court of Appeals continues to apply the transactional test. *See DiMatteo v. County of Doña Ana*, 785 P.2d 285, 291 (N.M. App. 1989) ("[t]he ultimate question, however, is whether the two actions arose out of the same transaction").

of the lieutenant's application for mandamus compelling the city to convene a board to review the merits of his termination. *Id.* at 355. According to the *Jarrett* court, "[a]lthough plaintiff's § 1983 claims (that his termination from employment violated his civil rights) differ from the claims asserted in the mandamus action (that plaintiff was entitled to a hearing to review his termination), the underlying cause of action in both actions remains the same: plaintiff's discharge from employment without a due process hearing." *Id.* at 357-58; *see also Welch v. Johnson*, 907 F.2d 714, 722 (7th Cir. 1990) (upholding *res judicata* effect of state post-termination grievance procedures because plaintiff's subsequent federal claim that the substantive reasons offered for her termination were a pretext for discrimination "are merely different factual sides of the same coin" as her defenses to her termination, which had been presented for administrative review); *Pirela v. Village of North Aurora*, 935 F.2d 909, 912 (7th Cir.), *cert. denied*, 112 S. Ct. 587 (1991).

The *Pirela* court considered whether judicial affirmance of administrative proceedings before the Board of Fire and Police Commissioners of North America were entitled to *res judicata* effect with respect to a subsequent federal lawsuit asserting violations of Title VII and § 1981. The court concluded that *res judicata* barred plaintiff's discrimination claim with respect to his termination. In discussing the transactional approach, the Court of Appeals for the Seventh Circuit stated:

> Both of Pirela's claims arose out of the same operative facts: Pirela's misconduct and the NAPD's procedures relating to suspension and termination. Because his Title VII and § 1981 claims in this litigation, as well as the possible defense he had in the state proceedings, concern this single procedural scenario, Pirela's action is barred by the transactional approach.

Id. As in *Pirela, Jarrett,* and *Welch,* Mitchell's race discrimination claims are barred by the doctrine of *res judicata.* This alternative basis for affirming the judgment below furnishes an additional reason that certiorari should be denied in this case.

CONCLUSION

For the reasons set forth above, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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December 13, 1993

APPENDICES

APPENDIX A

Answer to Complaint for Violation of Civil Rights,
U.S. District Court (Nov. 5, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Filed Nov. 5, 1986)

No. CIV 86-1184M

CARLOTTA MITCHELL,

vs. *Plaintiff,*

BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE,
d/b/a ALBUQUERQUE PUBLIC SCHOOLS,
LILLIAN BARNA, and JOE GROOM,
Defendants.

ANSWER

ANSWER TO GENERAL ALLEGATIONS

In response to the general allegations of the complaint, Defendants state:

A. Paragraph 1 is admitted;

B. The jurisdictional allegations of Paragraph 2 are acknowledged, but Defendants deny application of the statute cited therein and the jurisdiction of the court;

C. Paragraph 3 is admitted;

D. With regard to Paragraphs 4 and 5, Defendants are without knowledge or information sufficient to form

a belief as to the truth of the allegations contained therein and, therefore, deny the same; and,

E. Paragraph 6 is denied and Defendants affirmatively assert that Plaintiff has failed to exhaust her administrative remedies.

ANSWER TO COUNT I

In response to the specific allegations of Count I, Defendants state:

A. In Paragraph 7 and 8, Defendants admit that Plaintiff was a tenured teacher supervised by Defendant Groom on the date of her termination and deny all other allegations;

B. Paragraph 9 is denied;

C. With regard to paragraph 10, Defendants admit that Plaintiff was the only teacher of black heritage employed at the Bandelier School at the time of her termination and deny the remaining allegations because they are unaware of Plaintiff's definition of the term "recent memory"; and,

D. Paragraphs 11 through 25 and all other allegations not specifically admitted herein are denied.

ANSWER TO COUNT II

In response to the specific allegations of Count II, Defendants state:

A. The allegations of Paragraph 26 are admitted or denied as set forth hereinabove;

B. Paragraphs 27 through 29 are denied;

C. In Paragraph 30 Defendants admit that Lillian Barna was an agent and employee of the Board and deny each and every other allegation; and,

D. Paragraphs 31 and 32 and all other allegations not specifically admitted herein are denied.

FIRST AFFIRMATIVE DEFENSE

As a further, separate, and alternative defense, Defendants state that because Plaintiff has failed to exhaust her administrative remedies this action is barred and the complaint should, therefore, be dismissed.

SECOND AFFIRMATIVE DEFENSE

As a further, separate, and alternative defense, Defendants state that because they did not intentionally or otherwise discriminate against Plaintiff this action is barred and the complaint should, therefore, be dismissed.

THIRD AFFIRMATIVE DEFENSE

As a further, separate, and alternative defense, the Defendants state that because they have derivative judicial and/or quasi-judicial immunity from the claims asserted herein by the Plaintiff this action is barred and the complaint should, therefore, be dismissed.

FOURTH AFFIRMATIVE DEFENSE

As a further, separate, and alternative defense, Defendants state that because they have at all times acted in good faith, without malicious intent, and in reasonable reliance upon the law concerning the actions complained of herein, this action is barred by the defense of good faith immunity and the complaint should, therefore, be dismissed.

FIFTH AFFIRMATIVE DEFENSE

As a further, separate, and alternative defense, Defendants state that they did not violate any clearly established constitutional rights of the Plaintiff.

SIXTH AFFIRMATIVE DEFENSE

As a further, separate and alternative defense, Defendants assert that because Plaintiff has failed to mitigate her damages, if she has any, this action is barred and the complaint should therefore, be dismissed.

SEVENTH AFFIRMATIVE DEFENSE

As a further, separate and alternative defense, Defendants assert that this matter is not ripe for review because the adjudication of the same matter based on the same facts is on appeal before the New Mexico State Court of Appeals. This action is therefore barred, and the complaint should, therefore, be dismissed.

WHEREFORE, Defendants move the Court to dismiss with prejudice all claims against them, or in the alternative, for judgment in their favor and against Plaintiff, and for their costs herein incurred, attorney fees, and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

By /s/ Eleanor K. Bratton
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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to all counsel of record this 5th day of November, 1986.

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

By /s/ Eleanor K. Bratton
ELEANOR K. BRATTON

APPENDIX B

Excerpts from Brief in Supoprt of Defendants' Motion for Summary Judgment, U.S. District Court (Dec. 16, 1988)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 88-0615M

CARLOTTA MITCHELL,
Plaintiff,

v.

JOE GROOM, JOHN MONDRAGON, LILLIAN BARNA and ALBUQUERQUE PUBLIC SCHOOLS,
Defendants.

(Filed Dec. 16, 1988)

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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* * * *

STATEMENT OF MATERIAL FACTS

1. Plaintiff Carlotta Mitchell ("Mitchell") was terminated from her teaching position by the Board of Education of the City of Albuquerque for insubordination after she refused to prepare a written improvement plan as requested by her principal, Mr. Joe Groom. (Appendix A, exhibits from local board hearing).

2. An improvement plan is a supervisory technique frequently used in education. When a principal is unable to obtain changes in teacher behavior or performance through informal means, he or she may require a teacher to develop and implement a written plan for that teacher's improvement in specified areas. (Appendix B, excerpts from transcript of hearing).

3. Mr. Groom had directed Mitchell to develop a written improvement plan addressing her repeated instances of hostile and abusive conduct towards children and parents and her ongoing resistance to the school district's policy of "mainstreaming," which calls for integrating special education students into regular classrooms. (Appendix A).

4. Mitchell refused for over six months to submit a plan and finally submitted a plan for Mr. Groom's improvement, at which point she was suspended for insubordination. (Appendix C, exhibit from local board hearing).

5. Following her suspension, Mitchell had a full adversarial hearing before the Albuquerque Board of Education ("the local board") pursuant to the then-applicable statute, § 22-1-17 N.M.S.A. 1978 (1984 Repl. Pamp.). That statute and the attendant regulation SBE Regulation 77-1 provide:

> A. For an opportunity for all parties involved to appear and present testimony and information on all pertinent issues;

B. That the person . . . may be represented by counsel; and

C. That the technical rules of evidence and the rules of civil procedure shall not apply . . . but the contentions or the defenses of each party to the hearing shall be amply and fairly presented without substantial prejudice;

6. Mitchell's hearing before the local board lasted in excess of forty hours, and involved the testimony of twenty-four witnesses and the submission of over sixty exhibits. Mitchell was represented by counsel and had the opportunity to present and cross-examine witnesses.

7. In the course of the hearing, Mitchell contended that the stated reason for her discharge (insubordination) was pretextual and that instead she was really terminated because of racial bias against her. (Appendix D, excerpts from transcript of hearing).

8. In support of this contention she maintained that the parents and students were lying about her conduct toward them, and that she was treated differently than other teachers who allegedly also screamed at children and opposed the mainstreaming program. (Appendix D).

9. After hearing all the testimony and considering the evidence, the local board rejected Mitchell's contentions and unanimously voted to terminate her on the grounds of insubordination. (Appendix E).

10. Mitchell then appealed the decision of the local board to the New Mexico State Board of Education ("the State Board"), pursuant to the provisions of the then-applicable statute governing such appeals, § 22-10-19 N.M.S.A. (1984 Repl. Pamp.) That statute provides for a *de novo* appeal before a hearing officer appointed by the State Board. By stipulation of the parties, the *de novo* appeal was conducted by the hearing officer upon a full review of the transcript of the hearing before the local board, receipt of briefs from both parties, and a

hearing before the State Board. The State Board adopted the Recommended Findings of Fact and Conclusions of Law of the hearing officer (Appendix F), and found that Plaintiff's termination was based on good and just cause, and was neither arbitrary, capricious nor contrary to law. (Appendix G).

11. Mitchell did appeal the decision of the State Board to the New Mexico Court of Appeals pursuant to § 22-10-20(J), N.M.S.A. 1978 (1984 Repl. Pamp.). Before the state appeals court she renewed her argument that the decision to terminate her was not for good and just cause and not in accordance with law. The court reviewed the record, considered briefs, and rejected Plaintiff's argument, upholding the decisions of the local board and the state board. (Appendix H).

12. Prior to the state court's consideration of her appeal, Mitchell filed suit in this court on September 26, 1986, alleging that her termination was in violation of Title VII of the Civil Rights Act of 1964, 28 U.S.C. 2000(e) *et seq.* ("Title VII"). That case was scheduled for trial in February, 1988, but was postponed by the court on Defendants' motion of February 5, 1988, in which Defendants requested the court abstain from ruling on Mitchell's claims until final adjudication of those claims in state court.

13. The New Mexico Court of Appeals ruled against Mitchell on May 10, 1988. On May 5, 1988, Mitchell filed another suit in state court alleging that her termination was a violation of 28 U.S.C. § 1983 and § 1985. Defendants removed that action to the United States District Court for the District of New Mexico, and moved for consolidation on June 13, 1988. That motion is unopposed, but has not yet been ruled upon. Defendants now appear before this court requesting summary judgment on all Plaintiff's claims because the related preclusion doctrines of res judicata and collateral estoppel apply to their reconsideration.

APPENDIX C

Excerpts from Response to Defendants' Motion for Summary Judgment, U.S. District Court (Sept. 15, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-86-1184 JB

CARLOTTA MITCHELL,
Plaintiff,

vs.

BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE, *et al.*,
Defendants.

and

No. CIV-88-0615 M

CARLOTTA MITCHELL,
Plaintiff,

vs.

JOE GROOM, *et al.*,
Defendants.

CONSOLIDATED

(Filed Sept. 15, 1989)

RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Plaintiff responds to Defendants' Motion for Summary Judgment as follows:

STATEMENT OF MATERIAL FACTS

The Plaintiff agrees that the following material facts are uncontested: Number 3, 7, 9, 10, 12, and 13. As to Number 1, the Plaintiff states that she was terminated for insubordination but contests that she refused to prepare a written improvement plan. As to fact Number 6, the Plaintiff admits that there was such a hearing but denies that she had the opportunity to present witnesses because she did not have subpoena power at that hearing. As to fact Number 11, the Plaintiff admits that the state board decision was reviewed by the Court of Appeals but denies that the Court considered or addressed her contentions which form the basis of the instant case.

The Plaintiff tenders the following additional material facts:

1. The hearing before the school board was before a biased body inasmuch as the school board hires and fires the superintendent of schools who terminated the Plaintiff.

2. The school board has a vested interest in upholding the decisions of its superintendents.

3. At the hearing before the school board the Plaintiff had no subpoena power and could not compel the attendance of witnesses.

4. There were witnesses who were reluctant to testify on behalf of the Plaintiff because of fear for their employment.